United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/ affidavit

75-4225

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To be argued by
MARY P. MAGUIRE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4225

RAFAEL ALBERTO FERRARO and MARIA LUISA FERRARO,

Petitioners,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition to Review an Order of
The Board of Immigration Appeals

RESPONDENT'S BRIEF

ROBERT J. FISKE, JR.,
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STATEMENT OF THE ISSUE

WHETHER THE FAILURE OF THE BOARD OF IMMIGRATION APPEALS TO DETERMINE WHETHER PETITIONERS, BY VIRTUE OF THEIR DEPORTABILITY, HAD FORFEITED THEIR LAWFUL PERMANENT RESIDENT STATUS REQUIRES THAT THE MATTER BE REMANDED TO THE BOARD FOR A DETERMINATION OF THAT ISSUE

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a), Rafael and Maria Luisa Ferrero, husband and wife, petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on June 12, 1975. That order dismissed the petitioners' appeal from an order of an Immigration Judge finding them deportable under Section 241(a)(2) of the Act, 8 U.S.C. §1252(a)(2), as having entered the United States without inspection by an immigration officer as required by law, and granting their applications for the privilege of voluntary departure with an alternate order of deportation to Argentina in the event they failed to depart when and as required.

Petitioners contend that the Board erred in failing to determine whether they had forfeited their lawful permanent resident status by virtue of their "defective reentry" or whether they still maintain that status. This Court has jurisdiction under Section 106 of the Act, 8 U.S.C. §1105a.

STATEMENT OF THE FACTS

Petitioners Rafael Ferraro and Maria Luisa Ferraro are aliens, natives and citizens of Argentina, who are husband and wife. Rafael Ferraro was admitted to the United States for permanent residence on June 20, 1969 and his wife on April 9, 1971.

On May 25, 1973 the petitioners travelled to Toronto, Canada to visit relatives. When they returned to the United States during the early morning hours of May 28, 1973 they were accompanied by relatives from Argentina who did not have the necessary documentation for entry into the United States. Although the petitioners had their alien registration cards with them, they chose

to cross the border at a point where the immigration inspection station was unmanned at that hour of the morning.* Furthermore, after crossing the border the petitioners followed a southeast direction which took them to the main artery south to New York City. Shortly after they began traveling on that road they were apprehended by the Border Patrol and taken into custody.

Deportation proceedirgs were instituted against both petitioners on May 28, 1973 by the issuance of orders to show cause and notices of hearing. After extensive deportation hearings, the Immigration Judge entered a decision and order on October 7, 1974 in which he found that the record clearly established that the petitioners were deportable as aliens who had entered the United States without inspection. The Immigration Judge further found that the only discretionary relief which he could grant to the petitioners was the privilege

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*The record demonstrates that petitioners were aided in effecting their entry without inspection by two other persons. We have not discussed the evidence in detail because petitioners apparently do not question the finding of deportability or the factual basis therefor.

of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). Although clearly holding that voluntary departure was the only discretionary relief available to petitioners, the Immigration Judge's decision points to two Board decisions which he apparently cited as a basis for the petitioners to seek the return of their alien registration cards from the Service so that they could depart from the United States and reenter with proper inspection.

The petitioners appealed the decision of the Immigration Judge to the Board and in an order entered June 12, 1975 the Board affirmed the decision of the Immigration Judge and dismissed the appeal. The Board did not comment on the Immigration Judge's suggestion that petitioners' alien registration cards be returned to them so that they could effect a proper entry.

This petition for review was filed on October 20, 1975 and petitioners' deportation has been stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

RELEVANT STATUTE

Immigration and Nationality Act of 1952, as amended -

Section 241, 8 U.S.C. §1251 -

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who -

(1) * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

* * *

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS PROPERLY FOUND PETITIONERS TO BE DEPORTABLE AND THERE IS NO NEED FOR A REMAND TO THE BOARD SINCE PETITIONERS HAVE FORFEITED THEIR LAWFUL PERMANENT RESIDENT STATUS

Petitioners do not contest the finding of the Board that they are deportable pursuant to Section

241(a)(2) of the Act, 8 U.S.C. §1251(a)(2), as aliens who entered the United States without inspection. Rather, they contend that the failure of the Board to determine whether the petitioners have forfeited their status as lawful permanent resident aliens by virtue of their unlawful reentry requires a remand to the Board for a determination of that issue. We submit that such a remand is unnecessary since petitioners have been granted the only discretionary relief to which they are entitled and since the Board has already ruled in two precedent cases that a lawful permanent resident who subsequently becomes deportable by virtue of an entry without inspection no longer enjoys the status of being a lawful permanent resident.

Petitioners rely on the fact that the Immigration Judge pointed to two unreported decisions of the Board of Immigration Appeals which petitioners apparently contend stand for the proposition that aliens similarly situated to the Ferraro's had not forfeited their lawful permanent resident status. It is submitted that petitioners' reliance on the unreported Board decisions cited by the Immigration

Judge is misplaced and that the cited decisions do not stand for the proposition which petitioners suggest.

In Matter of Romero - Uranga,* (Immigration and Naturalization Service file No. A10 553 849, decided June 8, 1965 by the Board), the alien, a lawful permanent resident and native of Mexico, had made a brief visit to Mexico, sought readmission upon presentation of his alien registration card and was denied readmission because of his intoxicated condition. The immigration officer retained the alien's card and told him to reapply for admission several days later. However, the alien subsequently crossed the border and entered the United States without inspection. The Board found that the alien was deportable under Section 241(a)(2) as having entered without inspection and was not eligible for a waiver nunc pro tunc under Section 212(c) of the Act, 8 U.S.C. §1182(c). The Board then stated its belief, however, that "under the circumstances of this case, the alien's technical entry without inspection while in-

*The decision of the Board is reproduced at page 14 of petitioners' appendix.

toxicated should [not] be considered as an abandonment of his lawful permanent residence in the United States." The Board went on to suggest that the alien could apparently regularize his immigration status by leaving the United States pursuant to the grant of voluntary departure and then seek proper readmission with his alien registration card if the Service returned the card to him or that at the time of his future application for admission consideration be given to the waiver provisions of Sections 211(b) and 212(c) of the Act, 8 U.S.C. §§1181(b) and 1182(c).

The second case relied upon by petitioners is Matter of Gutierrez-Lavin (Immigration and Naturalization Service File No. A8 405 405, decided June 11, 1965 by the Board)* in which the alien, who had been a lawful permanent resident for thirteen years, made a twenty-four hour visit to Mexico. Upon seeking readmission to the United States the alien advised the immigration officer

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*The decision is reproduced at p. 18.

that he had lost his alien registration card ("green card") and was instructed to return with two photographs so that a replacement card could be issued. In order to avoid delay the alien crossed the border through a truck gate and evaded inspection. He was charged with deportability under Section 241(a)(2) as having entered without inspection. The Special Inquiry Officer had terminated the deportation proceeding on the ground that the alien had not made an entry within the meaning of Fleuti v. Rosenberg, 374 U.S. 449 (1963) and was therefore not amenable to deportation. The Board reversed the Special Inquiry Officer's ruling on the Fleuti issue but, because of the "sympathetic features of the case," remanded the matter to the Immigration Judge to give the alien an opportunity to secure his alien registration card and thereafter make proper application for admission as a returning resident.

Initially, we note that neither of the Board decisions relied upon by petitioners and referred to by the Immigration Judge are precedent decisions under 8 C.F.R. §3.1(g) and are not, therefore, controlling on

either the issue of the petitioners' lawful permanent resident status nor on the issue of the relief which may be accorded them. Furthermore, in both decisions the Board clearly limited its decisions to the facts and circumstances of the particular case.

In addition, the facts in the instant case can clearly be distinguished from the facts in both of the decisions relied on by petitioners. In each of those cases the alien had sought to enter at a designated inspection station and had in fact presented himself for inspection. Neither petitioner in the instant case made any attempt to seek inspection and admission. In the Romero-Urenga case, the Board noted that the case did not involve an attempt to enter the United States surreptitiously since he had crossed the border at a point where he was in full view of the immigration inspection.

The record in the instant case clearly establishes that station. The petitioners' entry was surreptitious.

It is significant to note that in both cases the aliens satisfied the waiver requirements of Section 212(c) of the Act, 8 U.S.C. §1182(c), in that both aliens were returning to an unrelinquished lawful permanent residence of more than seven years. While the Board held in the Romero-Uranga case that a nunc pro tunc waiver under Section 212(c) is not available to an alien who is deportable under Section 241(a)(2) for having entered without inspection, in both cases it was clearly the Board's reasoning that if the alien voluntarily departed and then sought to be readmitted as a returning lawful permanent resident alien, he would then be eligible to apply for a Section 212(c) waiver. The petitioners in the instant case are statutorily ineligible for such waiver since neither of them has the prerequisite seven years residence. Thus, the petitioners were granted the only discretionary relief available to them, i.e., voluntary departure. There would have been no purpose for the Board to discuss the cases relied upon by the petitioners, even though the cases were discussed by the Immigration Judge, since the Board could not even suggest that the petitioners

be treated in a fashion similar to the aliens in Romero-Uranga and Gutierrez-Lavin.

Petitioners' contention that the Board's "failure to determine whether the petitioners . . . had forfeited their lawful permanent resident status, or still maintained that status" requires a remand to the Board for a determination of that issue is without merit. In several published precedent decisions the Board has held that a lawful permanent resident who subsequently reenters the United States by means of a surreptitious entry loses his status as a lawful permanent resident. Matter of Kane, Interim Decision #2371, n.1 (Board of Immigration Appeals, April 1, 1975)*; Matter of M, 5 I & N Dec. 642, 647 (BIA 1954). It is reasonable to assume, therefore, that the Board saw no reason to comment on the Immigration Judge's gratuitous remarks regarding the petitioners' lawful resident status.

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*Reproduced in petitioners' appendix.

CONCLUSION

The petition for review should be dismissed.

ROBERT J. FISKE, JR.,

United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

CA 75-4225

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2nd day of March, 1976 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Schiano & Wallenstein, Esqs.,
80 Wall St.
NY NY

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
2nd day of March, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977